Legal Update

August 2017

The SJC holds that police officers responding to a request for assistance from school officials are bound by the 4th Amendment's traditional standards of reasonable suspicion and probable cause and cannot employ the less stringent standard of reasonableness that applies only to school officials acting alone.

Commonwealth v. Villagran, SJC No. 12239 (2017): On March 25, 2017, a Milton school official saw the defendant, an unknown individual, on school grounds. The defendant told the school official he needed to use the restroom and provided a fictitious name. The defendant left the school, but began "pacing around the school parking lot." Concerned by the defendant's behavior, the principal and vice principal approached the defendant and asked him what he was doing. The defendant said he was waiting to meet a girl who went to school there. At this point the school officials brought him to a school conference room. The defendant complied with the principal's directive to empty his pockets.

Sergeant Kristen Murphy of the Milton Police Department arrived at the school after learning that a male party was trying to gain entry into the high school. She was unaware of the defendant's interactions with school officials and did not now that he lied to gain entry into the school.

Both the vice-principal and the principal appeared to be "rattled." They stated that "something's wrong. Something's not right with this kid. Something's not right. He has something on him. I know he has something on him." **The principal did not explain the basis for his suspicions of the defendant nor did he indicate that he believed the defendant had contraband or a weapon in his possession**.

Sergeant Murphy smelled marijuana on the defendant. She conducted a pat-frisk and found marijuana along with $2,964 inside his pant pocket. She pat-frisked the exterior of the defendant's backpack and opened it after she felt a hard object. She removed a bottle of alcohol, a scale and a loaded firearm from the defendant's backpack.

The defendant was arrested and filed a motion to suppress. The motion was denied and the defendant was convicted of carrying a firearm without a license, G. L. c. 269, § 10 (a); carrying a dangerous weapon on school grounds, G. L. c. 269, § 10 (j); possession of a firearm without a firearm identification card, G. L. c. 269, § 10 (h); disturbing a school, G. L. c. 272, § 40; and possession of a class D substance with intent to distribute, G. L. c. 94C, § 32C.

Conclusion: The SJC held that the frisk of the defendant and the search of his backpack were unlawful because the police (1) lacked reasonable suspicion to believe he was engaged in criminal activity and that he was armed and dangerous, and (2) lacked probable cause to search the backpack.

1st Issue: Was the frisk of the defendant valid?

The SJC determined that the frisk was not lawful because the police lacked reasonable suspicion to believe the defendant was engaged in criminal activity. Looking at the totality of the circumstances, the SJC found that the smell of marijuana coming from the defendant along with his presence at a school where he did attend did not rise to the level of reasonable suspicion. Lastly, SJC found that the school officials' suspicions only amounted to a hunch.

Odor of Marijuana:

When Sergeant Murphy arrived at the school, she only knew that there was a non-student detained in the conference room and school officials wanted police assistance. School officials were suspicious of the defendant, but had no information that he had engaged in criminal activity. While Sergeant Murphy did smell an odor of marijuana when she entered the conference room, there were no other factors that indicated the defendant had

contraband on his person. The smell of marijuana alone is insufficient to support reasonable suspicion of criminal activity. See ***Commonwealth v. Meneide,*** 89 Mass. App. Ct. 448, 451 n.4 (2016) (smell of burnt or unburnt marijuana insufficient basis for either reasonable suspicion or probable cause).

Criminal Trespass:

Second, the SJC found that the defendant was not in violation of criminal trespass pursuant to G. L. c. 266, § 120. The defendant left the building after asking to use the restroom. School officials did not forbid him to be on school grounds and they brought him inside the school to the conference room. Based on these facts, there was not enough to charge him for criminal trespass.

School Officials' Suspicions:

When Sergeant Murphy conducted a pat-frisk of the defendant, she only had the principal's unsubstantiated hunch that the defendant "had something on him." None of the information available to Sergeant Murphy was sufficient to establish a reasonable belief that he was armed and dangerous.

Moreover, the principal's hunch combined with Sergeant Murphy's observations of the defendant's nervousness and Sergeant Murphy's testimony that both the principal and the vice-principal appeared to be "rattled" still did not establish a reasonable belief that the defendant was armed and dangerous because the defendant was compliant and did not make any furtive gestures or reach into his pockets in a manner that would suggest that he was carrying a weapon. See ***Commonwealth v. Brown***, 75 Mass. App. Ct. 528, 534 (2009) ("nervous or anxious behavior in combination with factors that add nothing to the equation will not support a reasonable suspicion that an officer's safety may be compromised"). Also, Sergeant Murphy never indicated that she believed the defendant was armed or that she feared for her safety and the school's safety. All of these factors fail to provide reasonable suspicion that the defendant was armed and dangerous and therefore the pat-frisk was not lawful.

2nd Issue: Were police justified in searching the defendant's backpack?

The SJC held that the search of the defendant's backpack was also not justified. As is well established, the search of the backpack must be justified by (1) probable cause and (2) an exception to the warrant requirement. Because the pat-frisk was not justified, Sergeant Murphy's observation that a "hard object" was present in the backpack could not

be considered in the probable cause analysis. Nor was the presence of a "hard object" sufficient to establish that it was a firearm. ***Commonwealth v. Flemming***, 76 Mass. App. Ct. 632, 638 (2010) (search under defendant's clothing unreasonable where there was no evidence that hard object felt like weapon).

Next the SJC examined whether the search of the defendant's backpack would have been justified as a search incident to a lawful arrest. Under Massachusetts law, Sergeant Murphy could have searched the backpack for the "fruits, instrumentalities, contraband and other evidence of the crime and removed any weapons that the arrestee might use to resist arrest or effect his escape." G. L. c. 276, § 1. This exception failed in this case because the defendant committed no crime and therefore could not have been lawfully arrested.

Response to the Dissent:

In response to the concerns voiced by the dissent, the SJC took "judicial notice of "the actual and potential violence in our public schools." ***Commonwealth v. Milo M.***, 433 Mass. 149 (2001). ***Commonwealth v. Whitehead***, 85 Mass. App. Ct. 134 (2014) (reciting instances of school shootings as basis for "heightened sensitivity" and reasonable suspicion for a pat-frisk and search of backpack where defendant was dressed in camouflage attire, openly displayed weapons, and affixed threatening decals to vehicle).

The fact of potential violence alone has not been used to limit a defendant's constitutional rights. For example, in ***Milo M.***, a juvenile argued that the judge focused on the apprehension of the teacher, who was the recipient of the threat, and that her subjective state of mind was insufficient to establish that he had the intent and ability to carry out the threat. The court concluded that the teacher's apprehension was objectively reasonable because the threats could come to fruition. ***Id.*** at 156-158.

With regard to the dissent's second position that the defendant had a diminished expectation of privacy when he arrived at the school, the SJC countered that "nothing in the Fourth Amendment or in art. 14 jurisprudence supports such limitations on a person's reasonable expectation of privacy. Even in ***New Jersey v. T.L.O.***, 469 U.S. 324 (1985), the Supreme Court did not tie its less stringent standard to an assumption that a student had a diminished expectation of privacy in the school setting. Rather, the court's holding reflected a judgment that a balancing of the student's privacy interests and the school's interest in maintaining order could be fairly accomplished without offending the fundamental Fourth Amendment requirement of reasonableness. See ***T.L.O.***, 469 U.S. at 341-343.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

"Here the school officials were appropriately cautious of the defendant and did what was expected of them to insure the safety of the students in their charge; they called the police. Thus, it is important to emphasize here that our ruling does not bear on what school officials themselves can and should do to insure the safety of students. Nor does our ruling handicap school officials in responding to behavior that presents a potential or real threat to student safety. **What we have said here relates only to conduct of police officers**, who as the Supreme Court noted in ***T.L.O.***, 469 U.S. at 343, are "schooled in the niceties of probable cause" and other constitutional requirements. Where school officials who engage in protective activity are "not acting in conjunction with or at the behest of law enforcement agencies, their actions are governed by a less stringent constitutional standard." ***Commonwealth v. Lawrence L.***, 439 Mass. 817, 820-821 (2003), quoting ***T.L.O.***, *supra* at 341 n.7.

Commentary: This case re-enforces that barring an exigency, police in a school setting are held to traditional 4th Amendment reasonable suspicion and probable cause standards when conducting pat-frisks or searching student belongings. School officials acting alone have more latitude and operate under a less stringent standard of reasonable suspicion.

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